



STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

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VIA ELECTRONIC MAIL

October 27, 2017

TO: Parties and Intervenors

FROM: Melanie A. Bachman *MAB*
Executive Director

RE: **PETITION NO. 1313** - DWW Solar II, LLC petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of a 26.4 megawatt AC solar photovoltaic electric generating facility on approximately 289 acres comprised of 5 separate and abutting privately-owned parcels located generally west of Hopmeadow Street (US 202/CT 10), north and south of Hoskins Road, and north and east of County Road and associated electrical interconnection to Eversource Energy's North Simsbury Substation west of Hopmeadow Street in Simsbury, Connecticut.

During a public meeting of the Connecticut Siting Council (Council) held on October 26, 2017, the Council ruled on the following request and motion:

1. Flammini, et al's Request to Withdraw Testimony and Exhibits of George Logan and Request for Relief from the Order to Compel Interrogatory Responses, dated October 17, 2017.

Flammini, et al.'s request to withdraw testimony and exhibits of George Logan was denied. Flammini, et al's request to for relief from the order to compel interrogatory responses was granted. Enclosed is a copy of the staff report, dated October 26, 2017.

1. Department of Energy and Environmental Protection's (DEEP) Motion to Withdraw Party Status, dated October 24, 2017.

DEEP's motion to withdraw their Party Status was granted with the condition that DEEP will continue to maintain the wall that currently exists between the DEEP Commissioner's designee on the Council and the Deputy Commissioners and DEEP Staff who appeared as a party to this proceeding.

MAB/laf

Enclosure



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DATE: October 26, 2017

TO: Council Members

FROM: Melanie A. Bachman, Esq. *MPB*
Executive Director/Staff Attorney

RE: **PETITION NO. 1313** – DWW Solar II, LLC petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of a 26.4 megawatt AC solar photovoltaic electric generating facility on approximately 289 acres comprised of 5 separate and abutting privately-owned parcels located generally west of Hopmeadow Street (US 202/CT 10), north and south of Hoskins Road, and north and east of County Road and associated electrical interconnection to Eversource Energy's North Simsbury Substation west of Hopmeadow Street in Simsbury, Connecticut. **Staff Report – Flammini, et al Request to Withdraw Logan Exhibits and Testimony and Request for Relief from Order to Compel.**

On October 17, 2017, Flammini, et al, a party to the above-referenced matter, submitted a request to withdraw the testimony and exhibits of their expert witness, Mr. George Logan (Logan Testimony and Exhibits), and a request for relief from the Connecticut Siting Council's (Council) October 10, 2017 order to compel responses to interrogatories (Order) from Flammini, et al submitted to Flammini, et al by the petitioner, DWW Solar II, LLC (DWW). Also on October 17, 2017, the Council requested written comments from the parties with respect to whether the request to withdraw Logan's testimony and exhibits, and the request for relief from the Order should be granted or denied by October 20, 2017. On October 20, 2017, DWW submitted a response to the Council's request for comments recommending the Council either:

1. Deny Flammini, et al's two requests and request Flammini, et al to follow the Council's rules and orders; or, in the alternative,
2. Dismiss Flammini, et al from this matter, or at a minimum, excuse DWW from answering interrogatories from Flammini, et al and disallow Flammini, et al to cross examine DWW.

On October 24, 2017, Flammini, et al submitted reply comments stating that the only appropriate measure the Council should consider is the exclusion of the Logan Testimony and Exhibits.

Pursuant to the Council's Rules of Practice, under Regulations of Connecticut State Agencies (RCSA) §16-50j-22a(c), the purpose of discovery is to:

"... provide the Council, parties and intervenors access to all relevant information in an efficient and timely manner to ensure that a complete and accurate record is compiled... Responses to information requests shall be separately and fully answered under the penalties of perjury by the witness who shall testify during the hearing as to the content of the response."

Under RCSA §16-50j-25(c), entitled, “Pre-Filed Evidence and Testimony”:

“At the discretion of the Council, any evidence or testimony may be required to be pre-filed by a date specified by the Council. All pre-filed evidence and testimony shall be received in evidence with the same force and effect as though it were stated orally by the witnesses, provided that each such witness shall be present at the hearing at which such prepared written testimony is offered, shall adopt such written testimony under oath, and shall be made available for cross-examinations directed by the Council.” (Emphasis added).

Finally, under RCSA §16-50j-29:

“In the event any person has given written testimony and is not available for cross examination at the time and place directed by the Council, all of such written testimony may be discarded and removed from the record at the direction of the Council.” (Emphasis added).

In accordance with the purpose of the hearing to provide all parties and intervenors an opportunity to present evidence and cross examine all issues to be considered by the Council under the Uniform Administrative Procedure Act (UAPA) and the Council’s Rule of Practice, the Council may exercise discretion relative to discovery requests. The right to fundamental fairness in administrative proceedings encompasses a variety of procedural protections.¹ According to the Connecticut Supreme Court, the only requirement in administrative proceedings is that the conduct of the hearing shall not violate the fundamentals of natural justice.² Fundamentals of natural justice require that there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by an adversary.³ This includes opportunities for the Council and the parties to conduct cross examinations required for a full and true disclosure of the facts.⁴

A. The Logan Testimony and Exhibits submitted on September 9, 2017 and the cross examination conducted thereon during the October 10, 2017 evidentiary hearing are part of the evidentiary record of this proceeding.

Flammini, et al were granted party status in this proceeding during a regular Council meeting held on August 31, 2017. The pre-filed testimony, resume and report authored by Logan were submitted to the Council and the service list for this proceeding on September 9, 2017. On October 3, 2017, counsel for Flammini, et al requested the Flammini, et al witness panel be allowed to appear for cross examination at the continued evidentiary hearing scheduled for October 10, 2017. No parties or intervenors objected to taking the Flammini, et al witness panel out of order and as a result, the Flammini, et al witness panel presented their direct case at 2 PM during the continued evidentiary hearing held on October 10, 2017.⁵ After all parties had an opportunity to cross examine the Flammini, et al panel, the Council took up the pending Motion to Compel Interrogatory Responses from Flammini, et al submitted by DWW on October 4, 2017 and ordered Flammini, et al to respond to any resubmitted interrogatories by DWW in accordance with the Council’s revised schedule. In accordance with the Council’s October 11, 2017 revised schedule, DWW resubmitted interrogatories to Flammini, et al on October 19, 2017.

¹ *FairwindCT, Inc. v. Connecticut Siting Council*, 313 Conn. 669 (2014); *Pet v. Department of Public Health*, 228 Conn. 651 (1994).

² *Id.*; *Grimes v. Conservation Commission*, 243 Conn. 266 (1997).

³ *Id.*

⁴ Conn. Gen. Stat. §4-178 (2017).

⁵ October 10, 2017 Evidentiary Hearing Transcript, pages 266, *et seq.*

The Logan Testimony and Exhibits that are the subject of the October 19, 2017 Flammini, et al requests were submitted to the Council and the service list for this proceeding on September 9, 2017 and were admitted into the record and subject to full cross examination by the Council and the parties in this proceeding on October 10, 2017.⁶ Under the UAPA, each party and the agency conducting the proceeding shall be afforded the opportunity to inspect relevant records, and to respond, cross examine witnesses and present evidence on all issues involved at a hearing.⁷ Logan submitted testimony and exhibits on September 9, 2017 and appeared at the October 10, 2017 evidentiary hearing where he verified his testimony and exhibits under oath. Consistent with principles of fundamental fairness, Logan's Testimony and Exhibits were fully subjected to cross examinations by the Council and the parties in this proceeding during the October 10, 2017 evidentiary hearing. Therefore, the Logan Testimony and Exhibits submitted on September 9, 2017 and the cross examination conducted thereon during the October 10, 2017 evidentiary hearing are part of the evidentiary record of this proceeding.

B. Relief can be granted from the Order without violating principles of fundamental fairness.

On September 26, 2017, DWW issued its first set of interrogatories to Flammini, et al in accordance with the Council's August 31, 2017 schedule. On September 27, 2017, prior to the October 3, 2017 deadline for the submission of responses to interrogatories, Flammini, et al responded to DWW's interrogatories with the statement, "As to questions 1 through 26 [Flammini, et al] have insufficient knowledge and expertise to respond. Mr. Logan, [the] expert and author of the REMA Report will be made available at the appropriate time in accordance with the Council's schedule... to be cross examined as to his testimony and report as on file with the Council." On October 3, 2017, counsel for Flammini, et al requested the Flammini, et al witness panel be allowed to appear for cross examination at the continued evidentiary hearing scheduled for October 10, 2017. Accordingly, since October 3, 2017 was the deadline for parties to submit responses to interrogatories for the October 10, 2017 continued evidentiary hearing, on October 4, 2017, DWW filed a Motion to Compel Responses to Interrogatories from Flammini, et al.

During the continued evidentiary hearing held on October 10, 2017, after DWW had an opportunity to cross examine the Flammini, et al witness panel, the Council ordered Flammini, et al to respond to any resubmitted interrogatories from DWW in accordance with the Council's revised schedule for the continued proceeding.⁸ On October 11, 2017, the Council issued a revised schedule with a final deadline date of October 19, 2017 for the submission of additional interrogatories and a final deadline date of October 26, 2017 for responses to interrogatories. On October 17, 2017, prior to the October 19, 2017 final deadline for submission of additional interrogatories, Flammini, et al submitted the request for withdrawal of the Logan Testimony and Exhibits and the request for relief from the Order. On October 19, 2017, consistent with the Council's October 11, 2017 revised schedule, DWW resubmitted interrogatories to Flammini, et al.

Although Flammini, et al did not object to any of the interrogatories submitted to it by DWW, Flammini, et al indicated a lack of funds for the purpose of providing Logan's responses to any resubmitted interrogatories and reappearance for cross examination on those responses. However, on October 19, 2017, consistent with the Council's October 11, 2017 revised schedule, Flammini, et al submitted interrogatories to DWW. While identifying this distinction and in support of its comments and recommendations on the Flammini, et al requests, DWW cites a Connecticut Supreme Court case noting that "dismissal of an action is warranted where the party's disobedience [of discovery requirements] was

⁶ *Id.*

⁷ Conn. Gen. Stat. §4-177(c) (2017).

⁸ October 10, 2017 Evidentiary Hearing Transcript, pages 355-363.

intentional, sufficient need for the information sought is shown and the disobedient party [is] not inclined to change position.”⁹ Under the UAPA and the Council’s Rules of Practice with regard to discovery, in lieu of dismissal, the Council may exercise discretion relative to discovery requests and need not employ the Court’s three-pronged inquiry in this proceeding.

Under the UAPA, any part of the evidence may be received in written form and cross examinations may be conducted by the agency and the parties required for a full and true disclosure of the facts.¹⁰ Under RCSA §16-50j-29, “in the event that any person has given written testimony and is not available for such cross examination at the time and place directed by the Council, all of such written testimony may be discarded and removed from the record at the direction of the Council.” As of this date, Logan has not submitted any additional written testimony or responses to interrogatories that could be admitted into the evidentiary record or subjected to cross examination. The final deadline for filing of interrogatories between parties in this proceeding expired on October 19, 2017. What has been admitted into the evidentiary record are the September 9, 2017 Logan Testimony and Exhibits upon which all parties and the Council, have had full opportunity to cross examine during the October 10, 2017 evidentiary hearing, as well as the unanswered October 19, 2017 second set of interrogatories submitted to Flammini, et al by DWW for which no party or the Council will receive the responses or an opportunity to cross examine thereon. Therefore, relief can be granted from the Order without violating principles of fundamental fairness.

Conclusion

Staff recommends the Council exercise the discretion conferred upon it under the UAPA and the Council’s Rules of Practice cited above to:

1. Deny the Flammini, et al request in part as it relates to the withdrawal of the September 9, 2017 Logan Testimony and Exhibits and cross examination conducted thereon during the October 10, 2017 continued evidentiary hearing session; and
2. Grant the Flammini, et al request in part as it relates to relief from the Order.

Staff also recommends the Council continue to exercise this discretion in any subsequent discovery issues that may arise during the pendency of this proceeding.

Finally, in accordance with the Council’s October 11, 2017 revised schedule and in recognition of the statement in DWW’s October 20, 2017 response to the Council’s request for comments that Flammini, et al has the ability to proffer new discovery requests to DWW, it should be noted that **the final deadline for filing of interrogatories between parties and intervenors in this proceeding expired on October 19, 2017.**

⁹ *Millbrook Owners Association, Inc. v. Hamilton Standard*, 257 Conn. 1 (2001).

¹⁰ Conn. Gen. Stat. §4-178 (2017).